Nephi Rubber Products Corp., a Cypher-Jones Company *and* Jerry D. Steele *and* Kim W. Hall *and* Keith Steele *and* Marlynn Buckley *and* Carl Calderwood *and* United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 948, AFL–CIO. Cases 27–CA–9671–2, 27–CA–9671–3, 27–CA–9671–4, 27–CA–9671–5, 27–CA–9671–6, and 27–CA–9674

May 29, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On February 7, 1990, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and answering briefs.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions only to the extent consistent with this Decision and Order and to adopt the recommended Order as modified.

The judge found that the Respondent was not a successor to Bastian Industries and, thus, did not violate Section 8(a)(5) and (1) by refusing to recognize or bargain with the Union that had represented Bastian's employees. The judge also found that the attempt of Charging Parties Jerry Steele, Kim Hall, Keith Steele, Marlynn Buckley, and Carl Calderwood to prevent the Respondent from purchasing Bastian Industries' plant and to substitute an employee stock ownership plan (ESOP) as the purchaser was not protected by Section 7 of the Act. The judge, therefore, concluded that the Respondent did not violate Section 8(a)(1) by delaying or postponing hiring of these individuals because of their attempt to prevent the Respondent from purchasing the plant. The judge further concluded, however, that the Respondent's subsequent refusal to consider these individuals for employment because they filed unfair labor practice charges violated Section 8(a)(4) and (1). We reverse the judge's dismissal of the 8(a)(5) allegation, but adopt his decision in all other respects.[3]

For some years prior to 1984, the Union represented the production and maintenance employees of Bastian Industries' rubber hose manufacturing plant in Nephi, Utah. In August 1984, Bastian's contract with the Union expired and Bastian closed the plant, laying off 92 employees.[4] In October 1984, Bastian filed a petition for reorganization under Chapter 11 of the Federal Bankruptcy Code. There was much community interest in reopening the plant, as it was the town's largest employer. Over the next year, a number of different rubber companies considered purchasing the plant, and a group of employees and supervisors, with the cooperation of the Union, pursued forming an ESOP to purchase and operate the plant. If no purchaser could be found, it appeared that the assets of the plant might be sold at auction. Finally, in October 1985, the Respondent, formed by two former Bastian customers, won the bankruptcy court's approval to purchase the plant.

Beginning in late October, the Respondent began hiring former Bastian employees and supervisors. The Respondent hired as its plant manager Bastian's plant manager and hired as controller Bastian's treasurer. The Respondent began plant operation in November 1985 and production began in January 1986. On April 9, 1986, when the Union requested that the Respondent recognize and bargain with it as the representative of the Respondent's employees, the Respondent had a work force of 53 employees, 50 of whom were former Bastian employees. By the end of 1986, the Respondent employed 63 employees, 58 of whom were former Bastian employees. The Respondent did not respond to the Union's recognition request.

In addressing whether the Respondent was a successor to Bastian, the judge rejected the Respondent's contention that it had started a completely new business in a changed form from that of Bastian. Noting that under *Valley Nitrogen Producers*,[5] ''where a new employer 'uses substantially the same facility and the same work force to produce the same basic products for the same customers in the same geographic area' it will be regarded as a successor,'' the judge found:

> Respondent has substantially continued the same operations at the same plant. A large majority of its employees were doing the same jobs under the same supervisors as they did when Bastian owned the plant. Respondent was using the same machinery, equipment, and methods of production and manufacturing the same products at the time of the Union's demand for recognition. The changes in Respondent's operation took place over time, but mostly after the recognitional demand.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In adopting the judge's dismissal of the 8(a)(1) allegation, we find it unnecessary to pass on whether Sec. 7 of the Act protected the activities of the individual Charging Parties in support of the ESOP prior to their efforts in October 1985 to prevent the Respondent from purchasing the Bastian plant.

[4] The judge's decision sets contract expiration variously as the spring of 1984 and August 1984. The record supports the latter date.

[5] 207 NLRB 208 (1973).

Thus, the judge found that the Respondent had met all the traditional criteria for successorship set forth in *Border Steel Rolling Mills*.[6] Nevertheless, because of Bastian's bankruptcy and the 16-month hiatus in plant operation and representation by the Union, during which the plant's future was uncertain, the judge found an absence of continuity between the Respondent and Bastian, and, therefore, declined to find that the Respondent was a successor to Bastian.

We do not agree that Bastian's bankruptcy and the 16-month hiatus warrant finding the Respondent not to be a successor. In its review of the principles governing successorship in *Fall River Dyeing Corp. v. NLRB*,[7] the Supreme Court stated: ''In conducting the analysis, the Board keeps in mind the question whether 'those employees who have been retained will understandably view their job situations as essentially unaltered.'''[8] The District of Columbia Circuit Court of Appeals likewise has explained:

> In determining whether the requisite ''substantial continuity of the employing industry'' exists, courts and the Board typically look to a variety of factors. . . . However, we have also made clear that
>
> > [t]he essential inquiry is whether *operations as they impinge on union members*, remain essentially the same after the transfer of ownership. [Citation omitted.]
>
> The focus of the analysis, in other words, is not on the continuity of the business structure in general, but rather on the particular operations of the business as they affect the members of the relevant bargaining unit. As recently noted by the Ninth Circuit Court of Appeals, ''the touchstone remains whether there was an 'essential change in the business *that would have affected employee attitudes toward representation*.'''[9]

The Board has articulated the same concept: ''In the successorship situation the events must be viewed from the employees' perspective, i.e., whether their job situation has so changed that they would change their attitudes about being represented.''[10]

In considering the present case with this concept in mind, we find that the job situation of the former Bastian employees who were retained by the Respondent was not so altered that it would have changed the employees' attitudes about union representation. Indeed, what is striking about the employees' job situation is how little it had changed. As set forth above, the judge found that the Respondent substantially continued Bastian's former operations at Bastian's former plant. At the time the Union requested recognition, virtually all the Respondent's employees were former Bastian employees. The employees were performing the same jobs under the same supervisors as when they had worked for Bastian, and the Respondent was using the same machinery and production methods and making the same products as Bastian had. As the employees' job situation at the time the Union requested recognition was essentially unaltered from their job situation when Bastian operated the plant, we find no basis for concluding that their attitudes toward representation would have changed.[11]

Nor does the 16-month hiatus in plant operation require a different result. As the Supreme Court stated in *Fall River*: ''[S]uch a hiatus is only one factor in the 'substantial continuity' calculus and thus is relevant only when there are other indicia of discontinuity.''[12] In *Fall River*, the Court found the 7-month hiatus between Sterlingwale Corp.'s demise and Fall River's startup not determinative of whether Fall River was a successor. In upholding the Board's finding that Fall River was Sterlingwale's successor, the Court found it particularly significant that, from the employees' perspective, their jobs did not change, because Fall River used the same production processes and job classifications as Sterlingwale and the employees

[6] 204 NLRB 814, 821 (1973). That decision articulates those criteria as follows:

> (1) Whether there has been a substantial continuity of the same operations; (2) whether the new employer uses the same plant; (3) whether he has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether he employs the same supervisors; (6) whether he uses the same machinery, equipment, and methods of production; and (7) whether he manufactures the same product or offers the same services.

[7] 482 U.S. 27 (1987).

[8] Id. at 43, quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973).

[9] *Food & Commercial Workers Local 152 (Spencer Foods) v. NLRB*, 768 F.2d 1463, 1470 (D.C. Cir. 1985), quoting *NLRB v. Jeffries Lithograph Co.*, 752 F.2d 459, 464 (9th Cir. 1985), quoting *Premium Foods v. NLRB*, 709 F.2d 623, 627 (9th Cir. 1983). The court's decision in *Spencer Foods*, which reversed the Board's dismissal of the 8(a)(5) allegation in that case, subsequently was endorsed by the Board. See *Sterling Processing Corp.*, 291 NLRB 208, 210 fn. 9 (1988).

[10] *Derby Refining Co.*, 292 NLRB 1015 (1989), enfd. sub nom. *Coastal Derby Refining Co. v. NLRB*, 915 F.2d 1448 (10th Cir. 1990).

[11] We also note that, before Bastian closed the plant, all the unit employees were union members, even though the plant is located in a ''right-to-work'' State.

We disagree with the judge's finding concerning absence of union representation during the hiatus. During this period, union funds and much of the energies of the Union's president were devoted to supporting formation of the ESOP and its effort to reopen the plant. The record reflects that, during this period, union representatives also met with employees, filed required reports, sent newsletters to employees, telephoned and wrote letters to employees, and pursued the issue of Bastian's pension obligations to the employees. Although there may have been less union activity during this period than there had been when the plant was in operation, there was continued union representation.

[12] 482 U.S. at 45, citing *NLRB v. Band-Age, Inc.*, 534 F.2d 1, 5 (1st Cir. 1976), cert. denied 429 U.S. 921 (1976), in which the court of appeals stated:

> While the Board has sometimes relied on a substantial hiatus between the termination of the predecessor's operations and the commencement of the new employer's operations in finding no successor obligation to bargain, it has done so only where the hiatus in operations is ''one of many factors pointing to such a substantial transformation in the nature of the predecessor's operations that a real question was presented, by the combination of circumstances, as to the employees' desire with regard to representation.'' *United Maintenance & Manufacturing Co.*, 214 NLRB 529, 532 (1974).

worked on the same machines and, for the most part, under the same supervisors as they had when employed by Sterlingwale. These facts are quite analogous to those in the present case.

Although we agree with the judge that the 16-month hiatus in plant operation and Bastian's bankruptcy indicate instability, we find that the instability and uncertainty during the period before the Respondent reopened the plant do not negate our finding that, once the plant reopened and employees were put back to work, they found their job situation basically the same as before.[13] Nothing about Bastian's bankruptcy or the hiatus period itself indicates that, once rehired, the employees would no longer desire union representation. Under the circumstances presented here, the hiatus, although 16 months in duration, was not ''of such length as to call into question the likelihood that former [Bastian] employees viewed their current jobs as essentially unchanged.''[14]

Accordingly, having concluded that, from the employees' perspective, there was substantial continuity between the Respondent and Bastian, and, as the record shows that at the time the Union requested recognition the Respondent employed a substantial and representative complement of unit employees, we conclude that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Nephi Rubber Products Corp., a Cypher-Jones Company, Nephi, Utah, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(b) and reletter the subsequent paragraph.

''(b) Refusing to recognize and bargain collectively with United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 948, AFL–CIO as the exclusive bargaining representative of the employees in the appropriate unit.''

2. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs.

''(d) On request, recognize and bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> ''All production and maintenance employees employed by Respondent at its Nephi, Utah facility but excluding superintendents, general foremen, foremen, assistant foremen, trainee-foremen, engineers, timekeepers, office employees, and all guards, professional employees, all other salaried employees not engaged in production and/or maintenance work and supervisors as defined in the Act.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to hire prospective employees because they filed charges with the NLRB or gave testimony under the Act.

WE WILL NOT refuse to recognize and bargain with United Rubber, Cork, Linoleum and Plastic Workers of America, Local Union No. 948, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Jerry Steele, Keith Steele, Marlynn Buckley, Carl Calderwood, and Kim Hall immediate and full reinstatement to the positions that they would have occupied if they had not been unlawfully denied employment, dismissing, if necessary, anyone who may have been hired or assigned to perform the work that they would have been performing or, if those positions no longer exist, to substantially equivalent posi-

[13] There was uncertainty during the hiatus period in *Fall River* as well, but in *Fall River*, as in this case, efforts toward a reopened plant continued throughout. Moreover, as noted above (fn. 11), the Union remained involved. Under all the circumstances, the hiatus simply was not sufficient to obliterate the employees' perception of their jobs in the reopened plant as essentially unchanged from their jobs with Bastian.

[14] *Coastal Derby Refining Co. v. NLRB*, 915 F.2d 1448, 1453 (10th Cir. 1990). We find the cases on which the judge relied in declining to find successorship, all of which involved bankruptcies and hiatus periods, to be distinguishable from the present case. In *Blazer Industries*, 236 NLRB 103 (1978), successorship was not found where, inter alia, the respondent's plant was 12 to 16 miles away from the asserted predecessor's former plant and the union told the respondent that it did not represent the respondent's employees. In *Cagle's, Inc.*, 218 NLRB 603 (1975), numerous factors in addition to a 1-year hiatus showed lack of continuity, including that the respondent had more new than old supervisory personnel, different equipment producing different and fewer products for different customers, and almost as many new employees as employees of the asserted predecessor. In *Gladding Corp.*, 192 NLRB 200 (1971), before the predecessor closed, its operations were taken over by the Small Business Administration; when it closed, it surrendered its premises to its landlord; and the alleged successor was part of a multiplant, integrated enterprise, and had only one customer in common with the alleged predecessor, obtaining other customers from unrelated sources.

tions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of the unlawful denial of employment to them, with interest.

WE WILL remove from their files any reference to the unlawful refusal to employ the above employees and notify them in writing that this has been done.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All production and maintenance employees employed by us at our Nephi, Utah facility but excluding superintendents, general foremen, foremen, assistant foremen, trainee-foremen, engineers, timekeepers, office employees, and all guards, professional employees, all other salaried employees not engaged in production and/or maintenance work and supervisors as defined in the Act.

NEPHI RUBBER PRODUCTS CORP., A CYPHER-JONES COMPANY

Albert A. Metz, Esq. and *Michael W. Josserand, Esq.*, for the General Counsel.
Thomas D. MacMullan, Esq., of Pittsburgh, Pennsylvania, for Respondent.
Jerry D. Steele, of Nephi, Utah, for the Union.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Provo, Utah, on May 2, July 18–20, and August 1, 1989. On May 2, 1986, Jerry D. Steele, Kim W. Hall, Keith Steele, Marlynn Buckley, and Carl Calderwood filed charges in Cases 27–CA–9671–2 through 27–CA–9671–6, respectively, alleging that Nephi Rubber Products Corp., a Cypher-Jones Company (Respondent) committed certain violations of Section 8(a)(3) and (1) of the National Labor Relations Act (29 U.S.C. § 151 et seq. (the Act)). All five of these charges were amended on March 30, 1987, and again on March 15, 1989. On May 5, 1986, United Rubber Workers Local Union No. 948 (the Union) filed a charge in Case 27–CA–9674 alleging that Respondent violated Section 8(a)(5) and (1) of the Act. On January 12, 1989, the Regional Director for Region 27 of the National Labor Relations Board issued a consolidated complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. On April 6, 1989, the Regional Director issued an amended consolidated complaint against Respondent alleging that Respondent violated Section 8(a)(4) and (1) by refusing to rehire employees Jerry D. Steele, Kim W. Hall, Keith Steele, Marlynn Buckley, and Carl Calderwood, because of their support for and activities on behalf of an employee-sponsored Employee Stock Ownership Plan and because the employees filed charges with the Board in the instant cases. The complaint further alleges that Respondent violated Section 8(a)(5) and (1) of the Act by failing to recognize and bargain with the Union as a successor employer. Respondent filed a timely answer to the complaint, denying all wrongdoing. Further, Respondent contends that the allegations of 8(a)(4) misconduct are time-barred by Section 10(b) of the Act.

On the last day of trial, Respondent's counsel informed the judge that Respondent had filed a petition for reorganization under Chapter 11 and moved that the instant case be stayed. That motion was denied.[1] Thereafter, Respondent was granted two extensions of time to file its posttrial brief. Briefs were filed on December 1, 1989.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

Respondent, a Utah corporation with a principal place of business in Nephi, Utah, has been engaged in the manufacture of hose products, hose assemblies, couplings, and related products. During the 12 months prior to issuance of the complaint, Respondent sold and shipped goods and materials valued in excess of $50,000 directly to customers located outside the State of Utah. Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union has represented employees at the manufacturing plant in Nephi, acquired by Respondent in October 1985, since 1972. In the spring of 1984, the Union's contract with Bastian Industries, then the owner of the plant, expired.[2] Prior to agreement on a replacement collective-bargaining contract, the plant closed in August 1984. Thereafter, Bastian Industries filed for protection under Chapter 11 of the Federal Bankruptcy Code in October 1984. In October 1985 Respondent purchased some of the assets of Bastian Industries through the Bankruptcy Court. In November 1985, Respondent began to hire the former employees of the manufacturing plant and commenced operation of the facility.

Between the time of the bankruptcy in 1984 and Respondent's purchase in October 1985, the employees, the city of Nephi, and the county of Joab were exploring various ways to reopen the plant. The plant had been the largest employer in this small town. With the aid of some professors at Brigham Young University, the employees explored the possibility of purchasing and operating the plant as an Employee Stock Ownership Plan (ESOP). Concurrent with the discussions of an ESOP, there were efforts to find an outside purchaser. Robert Cypher, the owner of one of Bastian's major customers, contacted Terry and Keith Jones, the principals of another major customer, with the idea of forming a joint ven-

[1] The petition was filed in Indiana on July 28, 1989.
[2] Bastian Industries operated the plant from 1973 to 1985.

ture to purchase the plant and continue the source of rubber hose to their companies. By October 1985, the candidates for acquisition of the plant had narrowed down to the ESOP and Respondent, the Company formed by Cypher and the Joneses. However, there also remained the possibility that the assets would be auctioned off separately with the result that the plant would not reopen. As indicated above, Respondent was able to reopen the facility in November 1985 and to hire back almost all of the former employees.

Against this background, the complaint alleges that Respondent refused to hire Jerry and Keith Steele, Kim Hall, Marlynn Buckley, and Carl Calderwood, all former employees of the plant, because of their activities in support of the ESOP. Further, the General Counsel claims that Respondent refused to hire the employees because they filed charges with the Board in violation of Section 8(a)(4) of the Act. The 8(a)(4) allegations were not included in the case until March 1989. Therefore, Respondent contends that these allegations are time-barred by Section 10(b) of the Act.

The complaint further alleges that Respondent was a successor employer to Bastian Industries and as such was obligated to recognize and bargain with the Union as the exclusive representative of the production and maintenance employees. Respondent denies that it is a successor employer and further contends that the Union was defunct at the time a request to bargain was made.

B. *The 10(b) Issue*

As indicated above the complaint alleges that after the employees filed charges with the Board in March 1986, Respondent refused to hire them in violation of Section 8(a)(4) of the Act. The original charges, filed in May 1986, alleged that Respondent failed to hire the alleged discriminatees because of their activities on behalf of the ESOP. The first consolidated complaint issued in January 1989 alleged that the five employees were not hired because of their activities on behalf of the ESOP. It was not until after the complaint issued that the charges were amended in March 1989 to include the allegations of an 8(a)(4) violation. Thereafter, the complaint was amended to add the claim that Respondent failed to hire the employees in violation of Section 8(a)(4) because they had filed charges with the Board.

As stated earlier, Respondent contends that the amended charges are time-barred by the 6-month statute of limitations in Section 10(b).

Section 10 (b) provides in pertinent part:

> that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . . Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon.

The principles governing this case were set forth by the Supreme Court in *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959). The Court held that a charge is not a pleading but merely the first document which activates the Board's investigatory process. The responsibility of making the investigation and in framing the complaint is with the General Counsel. Once the charge is filed, the General Counsel is left free to make a full inquiry and is not confined to the specific allegations of the charge. The Court held:

> [W]e hold only that the Board is not precluded from ''dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.'' *National Licorice Co. v. NLRB,* 309 U.S. 350, at 369. [360 U.S. at 309.]

The critical issue is whether the amended charges are related to the unfair labor practices of the original charges and grew out of them while the proceeding was pending before the General Counsel. The question of whether a matter is sufficiently related to the charge has been interpreted to allow the relation back of amendments alleging acts that are part of the same general course of conduct as the acts alleged in the charge and within the same timeframe. See *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1 (1st Cir. 1981); *Rock Hill Telephone Co. v. NLRB*, 605 F.2d 139, 142 (4th Cir. 1979); *NLRB v. Central Power & Light Co.*, 425 F.2d 1318, 1321 (5th Cir. 1970).

In *Kelly-Goodwin Hardwood Co.*, 269 NLRB 33 (1984), the Board held that an amended charge filed more than 6 months after the incident could properly allege a violation of Section 8(a)(3), although the original charge had alleged only violations of Section 8(a)(5) and (1). The Board held:

> It is well settled that the timely filing of a charge tolls the time limitation of Section 10(b) as to matters subsequently alleged in an amended charge which are similar to, and arise out of the same course of conduct, as those alleged in the timely filed charge. Amended charges containing such allegations, if filed outside the 6-month 10(b) period, are deemed, for 10(b) purposes to relate back to the original charge. This practice is wholly consistent with the statutory scheme, which establishes the charge merely as a vehicle for setting in motion the Board's investigatory machinery and, additionally, affords the Board leeway to issue a complaint on grounds other than those specifically set forth in the charge. [Id. at 36–37.]

In a recent case, *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), dealing with the catchall ''other acts'' language of the preprinted charge forms, the Board held that all complaint allegations, including allegations of Section 8(a)(1), must be factually related to the allegations in the underlying charge. The Board reaffirmed the closely related test set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988). First, the Board will look at whether the otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge. However, it is not necessary that the same sections of the Act be invoked. Second, the Board will look at whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending charge. Finally, the Board will look at whether a respondent would raise similar defenses to both allegations.

Applying these principles to the instant case, the new allegations are closely related to and grow out of the original charges. Both allegations focus on the same set of facts. It is the failure to hire the same five employees, during the

same continuing time period, which is at issue in both the original charges and in the amendments. The amendments only add another unlawful motive, based on Respondent's admissions, for the conduct at issue in the timely charges. Respondent would have to come forth and explain its reasons for not hiring the alleged discriminatees in any event. The timely charges should have resulted in Respondent preserving such evidence. The amendments could not have been included in the original charges because by their very nature they could not arise until after charges were filed by the employees. Further both the original charges and amendments were in the nature of continuing violations, i.e., the continuing refusal to hire these employees as positions became available. It seems clear that the original timely charges would support the amendment to the complaint with or without the amended charges. *Pergament United Sales*, 296 NLRB 333 (1989). Accordingly, I find that the 8(a)(4) allegations are not barred by Section 10(b) of the Act.

C. *The Successorship Issue*

Bastian Industries manufactured rubber hose and related products at the Nephi facility until August 1984. The facility was closed and in October a petition for reorganization under Chapter 11 was filed. In October 1985, Respondent purchased the plant, the equipment and real estate from the Bankruptcy Court. Respondent hired Roger Jorgenson, Bastian's plant manager, as its plant manager and Blair Painter, Bastian's treasurer, as its controller. Respondent then hired former supervisors and former employees of Bastian beginning in late October. The plant was opened in December 1985 and limited production started in January 1986.

During its startup period, most of Respondent's production was sold to the companies owned by Cypher and the Joneses. Thereafter sales were made to former customers of Bastian. With time, Respondent changed the direction of its marketing and increased the number of its customers and made changes to its product line. By 1989, Respondent had made substantial changes in financing, marketing, product lines, and customers. In addition Respondent had purchased a California company which made a related hose product and had transferred equipment and employees to the Nephi plant.

The former Bastian employees filed job applications with the Utah job service and were notified directly by Respondent of their hire. At the time the Union requested recognition in April 1986, Respondent had a work force of 53 employees, 50 of whom were former Bastian employees. By the end of 1986 Respondent employed 63 employees, 58 of whom were former Bastian employees. At the time of the hearing, Respondent employed approximately 160 employees. Bastian employed as many as 200 employees at the plant. However, in the month prior to the plant closing, Bastian employed only 80 employees.

General Counsel contends that Respondent has operated the business of Bastian in basically unchanged form, and has as a majority of its employees, individuals who were previously employees of Bastian. Respondent admits that a majority of its employees were previously employed by Bastian. Respondent contends it started up a completely new business in changed form, using the assets purchased from the bankrupt estate together with other assets purchased elsewhere.

In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court stated (406 U.S. at 281):

> where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent there is little basis for faulting the Board's implementation of the express mandates of Sec. 8(a)(5) and Sec. 9(a) by ordering the employer to bargain with the incumbent union.

The Board has held where a new employer ''uses substantially the same facility and same work force to produce the same basic products for the same customers in the same geographic area'' it will be regarded as a successor. *Valley Nitrogen Purchasers*, 207 NLRB 208 (1973). The Board has utilized the following criteria:

> Whether there has been a substantial continuity of the same operations; (2) whether the new employer utilizes the same plant; (3) whether the new employer has the same or substantially the same work force; (4) whether the same jobs exist under the same working conditions; (5) whether the new employer employs the same supervisors; (6) whether the new employer uses the same machinery, equipment and methods of production; and (7) whether the new employer manufactures the same product or offers the same services. *Border Steel Rolling Mills, Inc.*, 204 NLRB 814 (1973).

In the instant case, Respondent meets all the *Border Steel* criteria for the finding of successorship. Respondent has substantially continued the same operations at the same plant. A large majority of its employees were doing the same jobs under the same supervisors as they did when Bastian owned the plant. Respondent was using the same machinery, equipment, and methods of production and manufacturing the same products at the time of the Union's demand for recognition. The changes in Respondent's operation took place over time, but mostly after the recognitional demand. The question presented is whether the hiatus, from the closing in August 1984 to the reopening in December 1985, coupled with the bankruptcy proceeding negates a finding of continuity.

In *Gladding Corp.*, 192 NLRB 200 (1971), the Board found that the Respondent was not a successor based on a bankruptcy, subsequent control by a government agency and a hiatus of over 2 months before the alleged successor took over the operation of the manufacturing plant. In *Cagle's Inc.*, 218 NLRB 603 (1975), the Board found no successorship based upon, inter alia, a bankruptcy and a hiatus of almost a year. In *Blazer Industries*, 236 NLRB 103 (1978), the Board found no successorship based on, inter alia, a bankruptcy and a hiatus of more than a year.

In *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), the Supreme Court upheld a Board finding of successorship despite a hiatus of 7 months between the predecessor's demise and the successor's startup. The Court affirmed the Board's approach in determining the successorship question based upon a totality of circumstances. The Court found that the hiatus was only one factor in determining ''substantial continuity'' and relevant only where there are other indicia of discontinuity. There the Court found all the other factors suggested ''substantial continuity'' between the companies despite the 7-month hiatus. The Court noted that the hiatus may have been less than 7 months because the predecessor

retained a skeleton crew and was seeking to resurrect the business or find a buyer. The Court concluded that ''viewed from the employees' perspective, therefore, the hiatus may have been less than seven months.''

Although in *Burns*, supra, the Court found a successorship obligation to bargain based, inter alia, on the fact that the Union was recently certified, the successorship doctrine is equally applicable even if the union had not been recently certified. *Fall River*, supra. In our case, the Union is entitled to a rebuttable presumption of majority support based on its collective-bargaining agreement which expired in August 1984. However, it should be noted that the Union had not represented these employees, or any other employees, for a period of more than 18 months prior to the demand for recognition. During the long hiatus the employees, along with supervisors, local businessmen and politicians, sought to find outside buyers or to facilitate a takeover of the plant by the ESOP. It was clear that Bastian would not reopen the plant. It was the local entities and not Bastian that was recruiting prospective buyers in an effort to avoid an auction sale and a permanent dismantling of the plant.

Prior to the plant closing there had been substantial layoffs and sporadic production at the plant. After the bankruptcy filing, for over 1 year the future of the plant was uncertain. The plant was not operating during the bankruptcy. Even after Respondent barely escaped the bankruptcy auction sale, the opening of the plant was in doubt. The grant originally destined for the ESOP had to be restructed to make Respondent eligible. Thus, after Respondent's initial hiring of employees, hiring and production were put on hold until the financing was in place. There was a lag in acquiring customers and procuring orders so that production at the beginning of the startup was substantially for businesses owned by Respondent's principals. Thus, using the employees' perspective, here unlike *Fall River Dyeing* the hiatus would seem to be in excess of the 16 months of complete shutdown.

The Supreme Court's decision did not overrule the prior Board cases such as *Cagle's Inc.*, and *Blazer Industries*, supra, which found that based upon a bankruptcy and a hiatus of over a year there was not a substantial continuity of the employing industry. Here the bankruptcy, coupled with the long hiatus in both the operation of the plant and representation by the Union, suggests instability and discontinuity rather than substantial continuity.[3]

Accordingly, I decline to find that Respondent was a successor employer under the *Burns* doctrine.[4] I shall recommend that the 8(a)(5) allegations of the complaint be dismissed.

D. *The Failure to Rehire the Charging Parties*

After Bastian closed the plant, the city of Nephi, the county of Joab, and the Regional Development Agency sought to attract purchasers for the plant. The employees with the aid of professors from Brigham Young University formed an Employee Stock Ownership Program (ESOP) to reorganize and refinance the former Bastian-owned entity. The ESOP group had as its members former management of the plant, bargaining unit employees and members of city government. The ESOP group held meetings, formed committees, raised money, and sought loans and grants in an effort to buy and reopen the plant. The ESOP planned that employees would purchase shares in the corporation when called back to work. The group worked on securing loans for employees to purchase such shares.

The ESOP was able to secure a $700,000 HUD grant and a $360,000 job training grant controlled by the City of Nephi. These grants did not belong to the ESOP, but were available to whatever entity opened and operated the plant. After Respondent was able to purchase the facility from the Bankruptcy Court, the funds were eventually made available to Respondent.

ESOP did not obtain sufficient financing and the Bankruptcy Court scheduled a liquidation auction to take place in early October 1985. Bastian paid a deposit to the auctioneer and all the equipment was tagged for sale. It was obvious to both Respondent and the ESOP group that, if the equipment was auctioned, reopening of the plant would be highly improbable. Respondent made a bid of $1.2 million but that bid was opposed by the ESOP group and rejected by the Bankruptcy Court. Four days prior to the scheduled auction, Respondent raised its bid to the Bankruptcy Court. At a Bankruptcy Court hearing held on October 4, 1985, the ESOP group opposed Respondent's bid and sought additional time to purchase the plant itself. The Court rejected the ESOP's objections and approved a sale of assets to Respondent. During the pendency of the bankruptcy proceedings, and once after the Court approved the sale, Respondent rejected the efforts of the ESOP to participate as a partner in its venture.

Respondent hired supervisors and employees who had been active in the ESOP activities. However, it did not offer reemployment to the five charging parties even after vacancies arose in their positions. Further, Respondent declined to offer employment to the five charging parties even after it had offered employment to all former employees and had begun hiring employees without experience at this facility.

All five of the charging parties were active in ESOP activities. However, more meaningful was that Marlynn Buckley, Carl Calderwood, Keith Steele, and Jerry Steele were present at the bankruptcy proceedings at which the ESOP opposed the Respondent's offer to purchase the plant and equipment. Buckley, Keith Steele, and Jerry Steele had been identified in local newspaper stories as leaders in the ESOP's efforts to buy the plant. Jerry Steele was the union president, was chairman of the ESOP corporation and headed the employees' efforts to purchase the plant. While Kim Hall did not attend the Bankruptcy Court proceedings, he did publicly urge the Joab County Commissioners not to support Respondent's efforts to purchase the plant. Instead, Hall urged

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[3] I find *Sterling Processing Corp.*, 291 NLRB 208 (1988), and *El Torito-La Fiesta Restaurants*, 295 NLRB 493 (1989), cited by the General Counsel to be inapposite. Those cases involved hiatuses of over a year but involved a reopening by the same employer that had been signatory to the union contract.

In *Sterling Processing* the Board stated that it ''was not deciding whether a 19-month hiatus would warrant not imposing a bargaining obligation on an employer that was a different corporate entity from its putative predecessor.'' 291 NLRB 208, 210 fn. 10. In that case the respondent employer had shut down its operations during the term of the collective-bargaining agreement and reopened after the agreement had automatically renewed. Further, the Board found substantial contact between the union and employer during the hiatus.

In *El Torito-La Fiesta* the temporary shutdown and reopening both occurred during the term of the collective-bargaining agreement. The Board applied its contract bar rule and required the employer to honor its existing contract after the reopening.

[4] Under such circumstances, the Union would be free to file for representation rights under Sec. 9 of the Act.

that the County support the ESOP's bid as well as Respondent's. Hall was also active in the ESOP and a member of its board of directors.

Jerry Steele testified that in January 1986, he had a conversation with Supervisor Ralph Wilson about the chances for being hired at the plant. Steele testified that Wilson told him that Wilson had attended a meeting at which Roger Jorgensen indicated that none of the Steele family would be employed because they were considered to be troublemakers. Wilson was never asked if he made such a statement to Steele and, therefore, never denied the statement attributed to him by Steele.

Wilson testified that he had several conversations with Jorgensen in which he recommended that Jerry Steele be rehired to his former job as tuber operator. Wilson testified that Jerry Steele was an experienced tuber operator and a good employee. On one occasion, the tuber operator who was leaving also recommended Steele for the job. However, Jorgensen never responded to Wilson's recommendations and, instead, inexperienced workers were hired. Wilson denied that Jorgensen had told him that the Steeles would not be rehired because they were troublemakers.

Wilson could give no explanation for the failure to hire Jerry Steele. Jorgensen merely stated that he never got around to hiring Steele. However, he never reconciled that testimony with the fact that he hired inexperienced people, requiring 12 weeks of training, to perform this job rather than the very experienced Steele. While denying that the ESOP activities had anything to do with the failure to rehire Steele and the other employees, Jorgensen admitted that after the employees filed lawsuits (more correctly the NLRB charges), he no longer considered them to have the proper attitude and did not consider them for employment. Because of their activities in Bankruptcy Court the employees were considered too militant.

After Keith Steele applied for employment he was asked by Plant Superintendent Nilan Pickering if he had any animosity toward Respondent because of his ESOP activities. Steele answered that his attitude was good and that he only wanted the plant to prosper.

During a break in the bankruptcy proceedings, Respondent's accountant/attorney asked Jerry Steele what it would take to get Steele to stop opposing Respondent's offer. Steele answered that he represented all the employees and was not interested in anything the accountant had to offer. The accountant walked away.

In February 1989, Mayor Brad Park of the City of Nephi gave an affidavit to the NLRB attorney preparing the case for trial. In that affidavit Park stated:

> I asked why the men (Charging Parties) were not being hired back. Jorgensen told me that it was because of what the men had said at the trial up in Salt Lake City which involved the bankruptcy of Bastian Industries. He said that Cypher and Jones would not let him hire the men back because of that.

The affidavit further stated that Jorgensen said that maybe there was some hope for them to be hired back until they had filed suit against the company over in Denver.[5] Park further testified that he stopped his efforts to have the five employees hired after he learned that they had filed charges.

At the trial Mayor Park attempted to retract his statement by testifying that Jorgensen did not make these remarks. However, Park would not swear that his affidavit was untrue and consistently became confused when questioned about the alleged errors in the statement. Based on his demeanor and contradictory testimony, I found Mayor Park to be an untrustworthy witness. It was clear his friendship with Jorgensen and the City's interest in keeping the plant open were more important to Park than testifying truthfully in this proceeding. Park simply did not want to give testimony unfavorable to Jorgensen or Respondent. However, Park could not explain away his sworn affidavit. I find Park's pretrial statement more reliable than his confused and contradictory testimony.

Mayor Park is a member of Respondent's board of directors pursuant to the agreement by which Respondent obtained the $700,000 HUD grant. The City of which he is Mayor owns $700,000 in preferred stock of Respondent. The City has a population of 3000, a large percentage of whom work for Respondent. By virtue of Park's position on Respondent's board of directors, I find his pretrial affidavit to be an admission binding on Respondent under Rule 801 (d)(2)(D) of the Federal Rules of Evidence. As an admission of a party, the statement by definition is not hearsay. Once agency, and the making of the statement while the relationship continues, are established, the statement is exempt from the hearsay rule so long as it relates to matters within the scope of the agency. The Rule does not require that Park have personal knowledge of the facts underlying his statement. *Marlandt v. Wild Canid Survival Research & Center, Inc.*, 588 F.2d 626 (8th Cir. 1978).

General Counsel argues that the thrust and purpose of the employees' activities were to reopen the plant and secure employment for the former employees. While that may have been the purpose at the commencement of the ESOP activities, the focus of attention should be on the activities which took place in October 1985. At that time, Respondent was attempting to purchase the assets of Bastian; the ESOP was Respondent's sole competitor. While the employees sought to reopen the plant, the primary intent and meaning of their activities were to become the owners of the plant to the exclusion of Respondent. The evidence establishes no animus against ESOP activities in general. Rather it was the ''militancy'' in October 1985, and the continuing effort that jeopardized Respondent's purchase, which caused the animus against these employees. There was no apparent animus against other employees and supervisors active in the ESOP generally.

Section 7 of the Act provides that ''employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection.'' The issue presented here is whether the activities of the five employees on behalf of the ESOP were protected under Section 7.

In *Retail Clerks Local 770*, 208 NLRB 356, 357 (1974), the Board held that an employee has no protected right to engage in activities designed solely for the purpose of influencing or producing changes in the management hierarchy. Further, in pursuing such an object, the employees are not in any more favorable posture when these efforts are directed

[5] The charges were filed with the Board's regional office in Denver, Colorado.

towards a group outside the internal organization itself, such as the stockholders of a corporation.

The Board has thereafter held unprotected broad based activities to effect a change in the top management of the employer. *New York Chinatown Senior Citizens Coalition*, 239 NLRB 614 (1978). Further, the Board has held that employees' activities in an attempt to affect managerial policies are not protected. *Good Samaritan Hospital*, 265 NLRB 618, 626 fns. 33 and 34 (1982). See also *Lutheran Social Service of Minnesota*, 250 NLRB 35, 41–42 (1980).

I find the activity of the employees which caused Respondent not to hire them was the attempt in October to prevent Respondent's purchase in bankruptcy and to substitute the ESOP as the purchaser. I find that this activity is unprotected under the *Local 770* case and its progeny. The employees were in effect attempting to prevent Respondent's management from owning and operating the employing entity. The employees were attempting the ultimate change in the management hierarchy; they were attempting to substitute themselves as management. While the employees had every right to do so, they were not acting to improve their lot as employees but rather as entrepreneurs. As such, their efforts to prevent Respondent's purchase of the assets and to purchase the assets themselves related to a dispute outside the objectives of the mutual aid or protection provisions of Section 7 of the Act.

General Counsel argues that at the time of the refusal to hire, the ESOP was no longer a threat to Respondent and therefore could not not serve as a defense. I find that argument unpersuasive. If the activity was unprotected under *Local 770*, it does not become protected by the passage of time. While General Counsel is willing to forgive and forget, the statute does not compel Respondent to do so.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989, the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Corp.*, 462 U.S. 393, 399–403 (1983). I now apply the *Wright Line* test to the 8(a)(4) allegations.

In the instant case, after the charges were filed, the employees lost whatever chance they had for employment by Respondent. The testimony of Mayor Park and Plant Manager Jorgensen establishes that there was a possibility that the employees would be offered employment but the Mayor ceased his efforts and Jorgensen determined not to hire the employees after charges with the Board were filed.

As the Board stated in *Big E's Foodland*, 242 NLRB 963, 968 (1979):

> Essentially, the elements of a discriminatory refusal to hire case are the employment application, the refusal to hire each, a showing that each was expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus.

For the following reasons, I find that General Counsel has made a prima facie showing that Respondent discriminatorily refused to hire the charging parties because they filed charges with the Board. First, Plant Manager Jorgensen admitted that after the employees filed the charges they did not have the proper attitudes for hire. He testified that he considered them for hire for a certain period of time but his outlook and that of the owners changed after the charges were filed. Second, Park, a member of the Board of Directors, admitted that Jorgensen told him that there was some hope for the employees until they filed the charges. Park further admitted that his efforts to help the employees obtain employment ceased after he learned of the charges. Third, Jorgensen could give no credible reason why these employees were not hired. He stated that Respondent had not gotten around to hiring the employees but failed to explain, other than the filing of the charges, why Respondent did not hire these employees after it had exhausted all the former employee applicants and began hiring untrained applicants. Fourth, after Supervisor Wilson recommended that Jerry Steele be hired, Jorgensen would not respond and simply filled the position with inexperienced employees. Absent discrimination, Wilson's recommendations would have been followed. At the very least, Wilson would have been given some explanation as to why Steele was not being hired. Finally, all of the five applicants were senior employees, among the last to be laid off by these same supervisors under Bastian, and had good work records.

The burden shifts to Respondent to establish that the same action would have taken place in the absence of the employees' protected conduct. Respondent has not given any credible reason for not hiring the Charging Parties. Despite Respondent's denials, the record supports a finding that the Charging Parties were not hired because of their activities on behalf of the ESOP. However, that finding does not conclude our inquiry here. The testimony of Jorgensen and Park establishes that the employees were still being considered for employment and Park was attempting to help them until they filed charges with the Board. After the filing of the charges, Jorgensen's attitude and that of the owners changed. Upon learning of the charges, Park ceased and abandoned his attempts to help secure employment for the Charging Parties. Thus, Respondent's admissions preclude a finding that the employees would not have been hired absent the filing of the charges. On this record I find Respondent delayed or postponed hiring the employees because of their ESOP activities and thereafter unlawfully refused to consider the employees for employment because they filed charges with the Board.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act. Accordingly, Respondent will be ordered to offer Jerry Steele, Kim Hall, Keith Steele, Marlynn Buckley, and Carl Calderwood immediate reinstatement to the positions from which they were unlawfully excluded from employment, dismissing, if necessary, anyone who may have been hired or assigned to perform the work

they would have been performing if they had not been unlawfully denied employment, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges. Additionally Respondent shall be required to make all five Charging Parties whole for any loss of earnings they may have suffered by reason of the discrimination against them, with backpay to be computed on a quarterly basis, making deductions for interim earnings, *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be provided in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[6]

CONCLUSIONS OF LAW

1. Respondent, Nephi Rubber Products Corp., a Cypher-Jones Company, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By refusing to hire Jerry Steele, Keith Steele, Kim Hall, Marlynn Buckley, and Carl Calderwood because they filed charges with the Board, Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(4) and (1) of the Act.

3. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Except as found above, Respondent has not violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Nephi Rubber Products Corp., a Cypher-Jones Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire employees because they filed charges with the National Labor Relations Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of any rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Jerry Steele, Keith Steele, Marlynn Buckley, Carl Calderwood, and Kim Hall immediate and full reinstatement to the positions that they would have occupied if they had not been unlawfully denied employment, dismissing, if necessary, anyone who may have been hired or assigned to perform the work that they would have been performing, or if those positions no longer exist, to a substantially equivalent position, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of pay they may have suffered as a result of the unlawful denial of employment to them, in the manner set forth above in the remedy section entitled of this decision.

(b) Remove from their files any reference to the unlawful refusal to employ the above employees and notify them in writing that this has been done and that the refusal to hire will not be used against them in any way.

(c) Preserve and upon request make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the amount of backpay due under the terms of this Order.

(d) Post at its plant in Nephi, Utah copies of the attached notice marked ''Appendix.''[8] Copies of said notice, on forms provided by the Regional Director for Region 27, after being signed by its authorized representative, shall be posted immediately on receipt and maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notice to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from this Order what steps Respondent has taken to comply.

[6] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set forth in the 1986 amendment to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[7] All motions inconsistent with this recommended Order are denied. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''